STATE OF MICHIGAN

COURT OF APPEALS

KENT COMPANIES, INC., Plaintiff-Appellant,	UNPUBLISHED May 3, 2011
v	No. 295237 Kent Circuit Court
WAUSAU INSURANCE COMPANIES, Defendant-Appellee.	LC No. 08-009637-CK

Before: METER, P.J., and SAAD and WILDER, JJ.

PER CURIAM.

Plaintiff performed concrete work on a construction project and incurred additional expenses when a concrete slab that it had installed and some brick pavers installed by another contractor had to be removed and replaced because of damage caused by plaintiff's work to some snow-melt tubing under the concrete slab installed by plaintiff. Plaintiff submitted a claim for the additional expenses to defendant, its insurer under a commercial general liability policy, but defendant denied the claim. Plaintiff then filed this declaratory judgment action to determine its rights under the policy. The parties filed cross-motions for summary disposition under MCR 2.116(C)(10). The trial court granted defendant's motion and denied plaintiff's motion. The trial court also denied plaintiff's motion for reconsideration and denied plaintiff's motion to supplement the record to allow plaintiff to file an affidavit to clarify a factual matter. Plaintiff appeals as of right. We affirm.

Plaintiff's complaint for declaratory relief alleged that it was a subcontractor on a construction project at the JW Marriott Hotel in Grand Rapids. Plaintiff installed a concrete slab above some snow-melt tubing that was installed by another contractor. A different contractor then installed brick pavers above the concrete slab installed by plaintiff. Plaintiff alleged that it was notified by the general contractor that it failed to properly create weep holes in the concrete slab that it had installed, thereby causing damage to the snow-melt tubing. As a result, the snow-melt tubing had to be replaced, and plaintiff assumed responsibility for the cost of removing and replacing the original concrete slab and the brick pavers. Plaintiff submitted a claim to defendant for those expenses, but defendant denied the claim. It is undisputed that plaintiff's claim did not involve the cost of the damage to the snow-melt tubing.

Plaintiff argues that the trial court erred in determining that defendant's insurance policy did not provide coverage for the expenses associated with the removal and replacement of the concrete slab and brick pavers. We disagree.

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transp,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson,* 212 Mich App 45, 48; 536 NW2d 834 (1995). Interpretation of an insurance policy is also reviewed de novo as a question of law. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc,* 267 Mich App 708, 713-714; 706 NW2d 426 (2005).

Insurance policies are construed in accordance with this state's well-established rules of contract construction. *Liparoto Constr, Inc v Gen Shale Brick, Inc,* 284 Mich App 25, 35; 772 NW2d 801 (2009). The policy must be enforced in accordance with its terms and a court may not hold an insurer liable for a risk it did not assume. *Id.* When interpreting an insurance contract, this Court reads it as a whole and accords its terms their plain and ordinary meaning. *State Farm Mut Auto Ins Co v Descheemaeker,* 178 Mich App 729, 731; 444 NW2d 153 (1989).

The trial court relied on the following exclusion in defendant's insurance policy when it initially granted defendant's motion for summary disposition:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> * * *
>
> **m. Damage To Impaired Property Or Property Not Physically Injured**
>
> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

Later, however, when denying plaintiff's post-judgment motion, the court explained that defendant was also entitled to summary disposition because there was no "occurrence" under the policy.

We agree that coverage was not available for the expenses associated with the removal and replacement of the concrete slab that plaintiff originally installed because those expenses did not arise from an "occurrence" as defined in the policy. The policy provides, in pertinent part:

> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory" . . . .
>
> * * *
>
> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The undisputed facts show that plaintiff is attempting to recover the expenses it incurred for replacing its own product due to its own defective work. As explained in *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369, 377-378; 460 NW2d 329 (1990), plaintiff's defective workmanship does not involve an "occurrence" as defined in defendant's policy. See also *Liparoto*, 284 Mich App at 38-39. Although the snow-melt tubing had been damaged, and plaintiff's complaint premised its insurance claim on the damage to the snow-melt tubing, plaintiff was not seeking reimbursement for the cost of the damage to the snow-melt tubing itself; the contractor who installed it assumed that expense. Thus, it is immaterial whether the damage to the snow-melt tubing could be considered an "accident" under the definition of "occurrence." Accordingly, defendant was entitled to summary disposition on this issue.

Further, we conclude that any coverage for the expenses associated with the removal and replacement of the brick pavers is excluded by the exclusion in ¶ 2.m.(1). The brick pavers were not actually physically damaged. They were required to be removed and replaced only so that the concrete slab and snow-melt tubing could be replaced. Although the parties disputed whether plaintiff's contract with the general contractor required plaintiff to create the weep holes in the concrete slab with PVC pipe, as opposed to a metal rod, plaintiff did not establish a genuine issue of material fact with respect to whether its deficient installation of the concrete slab caused the damage to the snow-melt tubing, which in turn required the removal and reinstallation of the brick pavers. Regardless of whether the contract permitted plaintiff to use a metal rod to create the weep holes, plaintiff did not dispute defendant's evidence that it was plaintiff's deficient creation of the weep holes that caused the damage to the snow-melt tubing. Thus, there was no genuine issue of material fact that the expenses associated with the removal and replacement of the brick pavers arose out of a defect or deficiency with plaintiff's own work. Accordingly, defendant was also entitled to summary disposition with respect to these expenses.

Given the foregoing analysis, it is unnecessary to consider whether other policy exclusions or defenses might also apply to preclude coverage for plaintiff's claims.

Plaintiff also argues that the trial court erred in denying its motion to supplement the record after the trial court had denied its motion for reconsideration. We disagree.

"Evidentiary rulings are, in general, reviewed for an abuse of discretion." *DOT v Frankenlust Lutheran Congregation*, 269 Mich App. 570, 575; 711 NW2d 453 (2006). Plaintiff's motion sought leave to file an affidavit from one of its employees to dispute defendant's claim that plaintiff's contract with the general contractor required plaintiff to use PVC pipe to create the weep holes in the concrete slab. As explained previously, however, it is immaterial whether the contract required plaintiff to use PVC pipe to create the weep holes or permitted plaintiff to create the holes with some other tool. Regardless of any contract requirement concerning the use of a specific tool, there was no genuine issue of material fact that plaintiff's deficient creation of the weep holes caused the damage to the snow-melt tubing, which resulted in the additional expenses incurred by plaintiff. Thus, even if the trial court abused its discretion in denying plaintiff's motion to supplement the record, appellate relief would not be not warranted. Nonetheless, we agree with the trial court that plaintiff was on notice of the potential issue concerning the contract requirements, which was relevant to the applicability of the exclusion in ¶ 2.m.(2), and that plaintiff failed to provide a persuasive reason for why it could not have timely filed the affidavit earlier. Thus, we find no error.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Kurtis T. Wilder